No. 3514.

United States Circuit Court of Appeals

For The Ninth Circuit

GEORGE E. KNOWLTON and JERRY KNOWLTON
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendants in Error

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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Both of Portland, Oregon,
Attorneys for Plaintiffs in Error.

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LIST OF CASES CITED IN THIS BRIEF

STATEMENT OF THE CASE

The indictment against the appellants, George E. Knowltown and Jerry Knowlton contains two counts, the first being a charge of conspiracy to violate the Reed Amendment, and the second being a charge of violation of the provisions of the said Act itself. There was no verdict on the first count. but the appellants were found guilty on the second count. Florence Knowlton, wife of George E. Knowlton, jointly indicted with appellants, was found guilty, but the verdict as against her was set aside by the court. Motions for a new trial and arrest of judgment were overruled as to appellants and judgment was imposed, that they each be imprisoned in the Multnomah County Jail for a term of six months.

The indictment upon which conviction was had, charged that on June 10, 1919, George E. Knowlton and Jerry Knowlton did knowingly, wilfully and unlawfully order, purchase and cause to be transported in interstate commerc from the State of California to Portland in the State of Oregon, 435 quarts of intoxicating liquor, to-wit: whiskey, for beverage purposes, and that such intoxicating liquor was transported into Oregon, the law of which State prohibited the manufacture and sale therein of intoxicating liquor for beverage purposes, and that the said intoxicating liquor was not ordered, purchased and caused to be transported in interstate commerce for scientific, sacramental, medicinal or mechanical purposes, or for any other than for beverage purposes.

There is a marked distinction between the amount and character of the proof affecting each of the appellants, and we will therefore review the evidence as to each separately.

Testimony as to George E. Knowlton.

T. M. Word, a government agent, testified that in the early morning of June 10, 1919, while traveling on the road from Lakeview, Ore., to Bend, Ore., in company with the Sheriff of Lake County, Ore., and others, he came across two automobiles standing at the road side and stopped to look them over. One of the automobiles was of the Stutz make and the other was a Mercer. One machine had a California license and one an Oregon license, but the witness did not state which one had the Oregon license. In the Stutz car was George E. Knowlton and his wife, asleep, and Jerry Knowlton was in the back part of the Mercer. The government agent awakened George E. Knowlton and his wife and asked them how much liquor they had and they replied that they had a small amount for their own use, about fifteen or twenty cases. George E. Knowlton gave his name as George W. Wilson and Jerry Knowlton said his name was James King. The place where these automobiles were found was between twenty to twenty-three miles north of Lakeview, and about thirty-five miles from the California State line. At Bend the Sheriff and the Government agent took 234 bottles of liquor from the Stutz car. The witness said that some of the bottles were filled with whisky,

and a few bottles of brandy and a few bottles of gin. The bottles had revenue stamps on them. Shortly afterwards, at The Dalles, while the government officer and the prisoners were dining in a restaurant, some unknown person got into the Stutz machine and drove it away, and the car was later found abandoned and the liquor had disappeared. There was no liquor offered in evidence as coming from the Stutz car, nor was any of it in the possession of the witness at the time of the trial. The government agent could only testify that George E. Knowlton had whisky in his car from the appearance of the bottles. He never tested the liquor, nor is there any evidence that it was at any time tasted by anyone or shown to be intoxicating liquor. The government agent said that he had never seen either George E. Knowlton or Jerry Knowlton in the State of California; that he did not know from whom they bought the liquor, and that they told him they bought it in Oregon. Witness further said that both of the defendants had a fishing basket and some fishing tackle with them. (Transcript pp. 44 to 48).

E. E. Woodcock, county sheriff, corroborated the government officer with respect to finding the automobiles on the road, and that the occupants of the machines said that they had a little booze for their own use. He further said that both of the defendants told him and the government agent, that they had bought the liquor which was in their cars from some one in Oregon, a short while before. As far as he knew they might have gotten it in Oregon. He furthed testified

that the road upon which the defendants were found was the main traveled road from Lakeview to Bend; that Lakeview is fifteen miles from the nearest California point; the nearest California town to Lakeview is Fairport; the nearest large California town on the road to Lakeview is Alturas, which is about forty-five miles from the boundary line of Oregon; that there were no other roads running into the road where the defendants were found north of Lakeview, excepting roads leading from ranches. There are two roads leading from Lakeview to Paisley, Oregon, and there are also roads leading from Klamath Falls, Oregon, to Lakeview and from Silver Lake, Oregon, to Lakeview, Oregon. (Transcript pg. 49).

There was no evidence whatsoever to show that George E. Knowlton ordered or purchased any intoxicating liquor whatever in the State of California at any time or had anything to do with the ordering or purchasing of any liquor. There is further no evidence whatsoever that the liquor found in his car had ever been transported from California or had in fact ever been in California.

There was some attempt to show that George E. Knowlton had been in California, but this failed. The witness, Laugenour, testified, that on June 9, 1919, near lunch time, two men and a woman came into his store at Davis Creek, which is a town in California, twenty-five miles north of Alturas. He identified Jerry Knowlton as being one of the men and a spectator

among the audience in the court room, and not one of the defendants, as the other man and was not able to identify the woman, who, he said, wore a khaki uniform at the time. He said that Jerry Knowlton purchased some provisions; that he saw two machines through the window, at a glance, and said that one was a Stutz and the other a Mercer. An inspectiion of his cross-examination will show that he really had no opportunity to observe the makes of these cars, and that he merely had a fleeting glimpse of two machines. (Transcript pg. 51)

Another witness, Mr. Keser, testified that on June 9, 1919, at Alturas, he furnished a Stutz car with gasolene; that there was a man and a woman in the Stutz car, the woman being dressed in a khaki suit. The back of the car was piled up level with the back seat and covered with a blanket or canvas. On cross-examination he said that it was not an unusual thing to see a car so covered up and filled with bedding, etc., driven by tourists. He could not identify George E. Knowlton as being the man in the car and positively stated that his wife, Florence Knowlton, was not the woman he had reference to. The Stutz car he saw had white wire wheels and was a kind of maroon color, gold stripes and the lights painted white. It was later shown that the Stutz car owned by George E. Knowlton was a different one, because the wheels of the car were black and the body red and there were no stripes---gold or otherwise, and the fenders were black. (Transcript pg. 55.)

Another witness, Henry Kock, also testified that he recognized Jerry Knowlton in his restaurant and that Jerry had come in with another man to purchase sandwiches, but he could not recognize the other man and was unable to recognize George E. Knowlton as being in his place of business. (Transcript pg. 56.)

This was all the proof offered to connect George E. Knowlton with the crime charged in the indictment. There was no proof to show that he had ever been in California at any time.

Testimony As to Jerry Knowlton.

The testimony of the government agent and the sheriff with respect to finding the two cars on the road is the same as that against George E. Knowlton, and it will not be necessary to repeat it. There is this additional testimony, however.

The government agent said that in the Mercer car there was a wide mattress over the top and some blankets over that and a box of food and clothing. On the road later, Jerry Knowlton took out a box of provisions from his machine and made some coffee. The provisions were in a wooden box, the government agent ate a beef heart sandwich. The government agent further testified that there were about 201 bottles in the Mercer car. Several bottles were offered in evidence containing liquor and the government agent said that these came from the Mercer car. Jerry Knowlton told

the sheriff and the government agent that they bought the liquor which was in his car from some one in Oregon, a short while before. (Transcript pp. 44 to 50.)

We have already referred to the testimony of the witness Laugenour, who said that he identified Jerry Knowlton as being the person who was in his store on June 9, 1919, about lunch time, and purchased some provisions, in company with two other unidentified persons. (Transcript pg. 51.)

We have also referred to the testimony of witness Kock, who said that on the 8th or 9th of June, 1919, between 11 A. M. and 1 P. M., two men came into his lunch counter at Alturas, California, and purchased twenty sandwiches, ten beef heart and ten pork sandwiches; that the sandwiches were placed in a spaghetti box; that Jerry Knowlton was one of the men, but he could not identify the other. The sandwiches were purchased between eleven and one o'clock in the day time, on the 8th or 9th of June. This witness was aided in identifying Jerry Knowlton by being shown his picture by the government agent in California and again when he came to Portland to testify in the case. (Transcript pg. 56).

The witness Ash, testified that on June 9, 1919, between one and two o'clock in the afternoon, a man drove into his garage at Alturas for the purpose of having a broken frame repaired. He identified this man as Jerry Knowlton, he said the car was heavily loaded, because it broke through the floor at one place,

but later said that a Mercer car would weigh about 4200 pounds; that the garage had a wooden floor, which was old, and that before this time a two ton truck had broken through it. The car was not fixed until about ten P. M. of the same day. After the car was finished Jerry Knowlton went around to the right hand-side of the car and reached in and pulled out a bottle of brandy which had been partly consumed. The witness never paid any attention to how he got the bottle. The back of the car seemed to be pretty well filled up, but it was covered over and the witness did not know what was inside. The contents of this bottle were wholly consumed by the witness, his father and Jerry Knowlton, and the bottle left lying in the shop. (Transcript pg. 52.)

This was all the evidence against Jerry Knowlton. There was no evidence whatsoever that he either ordered or purchased any liquor at any place in California, at any time; there was no evidence that he ever had any liquor in California, except the single bottle which was consumed in the shop at Alturas. There was no evidence that the liquor found in his car was ever at any time in California or that he brought it from California. There was no evidence tending to show that he did not buy it in Oregon, as he claimed to the officers.

The above, we think, is a fair statement of all the testimony in the case, as shown by the Bill of Exceptions, which contains all of the testimony material to

the exceptions taken and noted therein. (Transcript pg. 75.)

The principal exception taken in the case and the one upon which appellants base their argument, is the refusal of the court to direct a verdict of acquittal, after the close of the evidence, because there had been no proof of the offense charged in the indictment. (Transcript pp. 57-58.)

SPECIFICATIONS OF ERROR

I.

The court erred in refusing to direct a verdict for the defendant, George E. Knowlton, at the close of all the testimony in the case, upon the said defendant's motion. Assignment of Errors I, III, VI, VII, and VIII.

II.

The court erred in refusing to direct a verdict for the defendant, Jerry Knowlton, at the close of all the testimony in the case, upon the defendant's motion. Assignment of Errors, II, IV, VI, VII and VIII.

POINTS AND AUTHORITIES.

An inference from facts proved, in order to justify a conviction, must be inconsistent with innocence. The facts proved must reasonably justify the inference and

the accused cannot be convicted on mere conjecture or suspicion.

16 Corpus Juris, 760, Sec. 1560.

In order to sustain a conviction on circumstantial evidence all the circumstances proved must be consistent with each other, consistent with the hypothesis that accused is guilty and at the same time inconsistent with the hypothesis that he is innocent and with every other rational hypothesis, except that of guilt,

16 Corpus Juris, 763, Sec. 1568.

The facts which form the basis of the corpus delicti must be proved by either direct or presumptive evidence of the most cogent and irresistible kind.

16 Corpus Juris, 771, Sec. 1579.

Circumstantial evidence alone is insufficient to establish the corpus delicti where it suggests a theory as consistent with the absence as with the existence of crime.

White vs State 18 Ga., A. 214, 89 S. E. 175.

Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with

guilt, it is the duty of the appellate court to reverse a judgment against him.

Union Pacific Coal Company, vs U. S. 173;

Fed. 737, at 740;

Isbell vs U. S. 227 Fed. 788,at 792;

Wright vs U. S. 227 Fed. 855;

Scoggins vs U. S. 255 Fed. 825;

Goff vs U. S. 257 Fed. 294.

Moral probability, however strong, cannot take the place of legal evidence, and inferences which the jury may draw in a case must be based upon facts which of themselves tend to establish the guilt of the accused.

Wolf vs U. S. 238 Fed. 902, at 906.

ARGUMENT

In order to convict either of the defendants upon the indictment in this case it was incumbent upon the government to prove beyond a reasonable doubt that on some date within the statute of limitations the defendants, or either of them, did knowingly order, or purchase, or cause to be transported in inter-state commerce from California into Oregon, a quantity of intoxicating liquors, for beverage purposes and not for any of the excepted purposes mentioned in the Statute. All of these elements of the crime must be proved.

As will be seen from an inspection of the record,

the only evidence against George E. Knowlton consists of the fact that he was found, together with his wife, in an automobile, on a road about twenty miles or more north of Lakeview, Oregon, and about forty miles north of the California line. There are a number of other roads joining the said road leading from ranches and from several towns in Oregon, at points south of where they were found. There is no testimony that he or his wife were ever in California, or that he transported or caused to be transported, any liquor from California to Oregon. Further, there is no substantial testimony in the record to show that the liquor that he had in his car was intoxicating liquor and no testimony to show what or where his destination was, or whether it was Oregon or Washington or Idaho, or some other State. Further, there was no testimony to show that he had any previous association with the other defendant, Jerry Knowlton, or that they were together for any length of time previous to the occasion of their arrest by the government agent. The facts are just as consistent with his innocence as with his guilt. If he actually had any intoxicating liquor in his car, which the government failed to prove, it is just as consistent to conclude that he obtained it some place in Oregon as in California; there is no legal presumption that he obtained it in California. There is no more than a probability or a possibility that he transported intoxicating liquor from California. As far as the evidence shows it is just as likely that he obtained the liquor at Lakeview, Klamath Falls, or some other place in Oregon.

It is true there is some testimony to the effect that the day before his arrest, Jerry Knowlton was in the State of California, but there is absolutely no proof that he ordered, purchased or caused to be transported any intoxicating liquor from California to Oregon, nor is there any proof that he ever had any intoxicating liquor at any place, except in Oregon, and it is just as consistent to draw the conclusion that he bought it in the last mentioned State as that he bought it in the State of California. In fact, the jury had no substantial evidence, whatsoever, before them upon which to conclude that he purchased the liquor in California or transported it from that State to Oregon. In fact, the evidence of both the sheriff and the government agent is to the effect that he told them he had purchased the liquor in the State of Orgon, and there appears to be no evidence in the record to the contrary.

The test laid down by the authorities, that there must be substantial evidence of facts which exclude every other hypothesis but that of guilt, has not been met by the government. There may be a moral probability of guilt, but that cannot take the place of legal evidence.

In the case of Isbell vs U. S. 227 Fed. 738, above cited, one Isbell was convicted for introducing intoxicating liquor into the State of Oklahoma from without that State. The evidence showed that the defendant was a drayman and one Hostetter had employed him to haul household goods from Chetopa, Kansas, to Tiff

City, Missouri, across a part of Oklahoma. He was arrested at Vinita, Oklahoma, and a number of barrels of whisky and wine, marked "household goods" were confiscated, some of the barrels of wine were marked "for Mrs. Isbell". The defendant claimed to be ignorant of the contents of the freight he was hauling. In this case the defendant was found with the liquor in the State into which the introduction of liquor was forbidden; it was shown that he came from another State, and yet the court held that the evidence was insufficient and reversed the conviction, because the destination of the liquor was not proven to be in Oklahoma.

In Goff vs U. S. 257 Fed. 294, above cited, the defendant, as in the last case, was convicted of introducing liquor into Oklahoma, formerly Indian Territory. He was found by officers in Nowata, Oklahoma, a point about twenty-four miles from the Kansas line, traveling in a Ford car, equipped with a false bottom, having concealed in and about the car more than 280 pints of whisky and some beer. There was no proof that he could not have obtained this supply of liquor in Oklahoma. The appellate court reversed the conviction in this case, because the corpus delicti was not proved. This case is very much like the one at bar.

In Wolf vs U. S. 238 Fed. 902, above cited, the defendant, Sam Wolf, was indicted, with others, for concealing assets in bankruptcy; Sam Wolf was the president of the bankrupt concern. It was shown that at least he was in a position to know of certain conceal-

ment of assets of the bankrupt concern, but the court held that this was not enough and reversed the conviction, saying that the conviction rested wholly on inference and conjecture, and that moral probability, however strong, could not take the place of legal evidence, and inferences which the jury might draw must be based upon facts which of themselves tend to establish the guilt of the accused. This case, we think, is very much in point, because the convictions in the case at bar are based wholly upon conjecture. The fact that the defendants had in their possession a quantity of intoxicating liquor at a point forty miles north of the California line, raises no inference, legal or otherwise, that they transported the same from California.

In Duff vs U. S. 185 Fed. 101, the defendant was convicted of refilling a bottle containing distilled spirits, which had been filled and stamped under the revenue law, without removing and destroying the stamp previously affixed. The evidence showed that the revenue officers found such bottles in the defendant's premises unlawfully refilled and that the defendant was one of three persons who had a special tax stamp for the saloon in question, there was no evidence to show who refilled the bottle. The appellate court reversed the conviction in this case because the evidence was insufficient.

In the case of Scoggins vs U. S. 255 Fed. 825, where the defendant was convicted of selling whisky without having paid the revenue tax, the testimony showed the

transaction by the witness with the defendant in which there appeared to be some doubt as to whether a sale actually took place or whether the transfer of the liquor was a gift and because there was no substantial evidence of all the requisites of a sale, the judgment was reversed.

In Stager vs U. S. 233 Federal 510, the defendant, a federal official, was convicted of conspiring with others, to divulge confidential information regarding invoices and appraisements, contrary to the regulations of the Treasury Department. The evidence showed no more than an opportunity to commit the crime, that such information was divulged, and the possibility that defendant might have divulged it. The appellate court reversed the conviction on the ground that the evidence was insufficient.

This last mentioned case, we think, is in many ways parallel to the one at bar. The only evidence offered at the trial was to show that there was some liquor found in Oregon in two automobiles, and that the defendants had an opportunity to have brought it from California or that it was possible for them to have done so, but no evidence to show that they did.

In the case of Martin vs U. S. 264 Fed. 950, defendant was convicted of having transported intoxicating liquor from Missouri to Nebraska. The evidence showed that a quantity of whisky was found in his residence in Nebraska, also that he had pleaded guilty to

a complaint in the State court to a state of facts equivalent to the charge in the federal indictment. The court reversed this conviction because the evidence was insufficient, in that there was no proof of the corpus delicti corroborating the extra judicial admission.

In the light of the above authorities, we think there is no question but that the trial court should have upon the motion of the defendants, directed a verdict of acquittal as to each of them, because the indictment against them was not proven and the corpus delicti was not established.

Wherefore, appellants pray that the judgment against them, and each of them, be reversed and that they be granted a new trial.

Respectfully submitted.

MANNING & BECKMAN,

Attorneys for Appellants, George E. Knowlton and Jerry Knowlton.